

FEDERAL MARKET REGULATION AND  
AGRICULTURAL COOPERATIVES: TODAY AND TOMORROW<sup>1/</sup>

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I was asked to address the impacts of governmental regulation on cooperatives. But, that is a big area to cover, so I have narrowed things down a bit. As a marketing economist whose government experience has been primarily at the Federal level, I will concentrate on Federal market regulations. I will ignore the morass of other Federal, state and local regulations--labor, environmental, health, safety, taxation, zoning and land use just to mention a few--which affect agricultural cooperatives in numerous ways. Thus, I've recognized my omissions. But I do not apologize, for my emphasis is on what I know best.

My plan is this: I will first review the rationale for Federal market regulation. Then, identify how and why this rationale is changing in today's regulatory environment. Finally, I will discuss the implications of these changes, as I see them, for cooperatives.

Rationale For Market Regulation

The classic argument for Federal intervention in the marketplace goes something like this: A private, free enterprise society such as the United States must maintain a viable, general market system as a means of organizing and coordinating the myriad of decentralized economic decisions.

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Furthermore, it is necessary to maintain competition in order for the market system to provide economic discipline for society as an alternative to direct control by Government or private cartel. In order to maintain competition, it is appropriate for the Federal government to create as nearly as possible those conditions necessary for competition in the marketplace.

This line of reasoning has resulted in several Government programs aimed at improving competition in agricultural markets. Examples include: (1) Federal-state market news, aimed at improving knowledge of marketing opportunities and increasing competitive interaction, (2) product grades and standards and fair labeling and packaging rules, aimed at reducing product differences which encumber competition, and (3) anti-trust laws designed to prevent collusion among market participants.

However, closer examination of many regulatory programs suggests that their primary purpose rests not in improving competition, but rather in making the lack of competition more acceptable. By this I mean that much market regulation is designed more to prescribe certain outcomes, or at least to prevent particularly undesirable market results, rather than to create conditions conducive to competitive self-discipline.

Let's look at some specific examples. While the Packers and Stockyards Act does include language designed to prohibit collusion among buyers, most of its provisions deal with trade practices, that is, provisions which prohibit or prescribe certain practices such as restraining trade, deception, and bonding. The intent of the Agricultural Fair Practices Act was to prevent discrimination against colluding sellers. The Perishable Agricultural Commodities Act prescribes payment behavior for large, dominant buyers. And the Commodity Futures Trading Commission

Act declares numerous trading acts to be fraudulent and criminal rather than non-competitive.

Clearly, the Capper-Volstead Act and other policies which facilitate collective action in agricultural markets are not fully consonant with the "enhance competition" rationale. Rather, they are based upon the principle of giving certain groups more influence over the outcome of the marketing process than they would otherwise have. That is, making the outcome of the marketing process more acceptable.

Marketing orders provide perhaps the best example. These have, in large, been instituted not because competition has been absent, but because performance was considered unacceptable--unacceptable from the viewpoint of one or more groups with enough political power to bring about a political solution to their perceived economic problem. Disorderly marketing, meaning highly uncertain supplies and prices, has been one major economic problem leading to market order regulations. These regulations control the flow of products to various markets and administer the pricing process. As such, they have helped make performance more acceptable. But they certainly have not perfected competition.

This is not to suggest that producers have realized all of their aspirations with market order regulations. To the contrary, accomplishments are usually well short of their desires. In most order situations, producers' have wanted both more stability and higher prices. Stability has also been sought by other groups in the marketplace--namely, handlers and consumers--and has been more readily achieved than have higher prices, which have less widespread political support.

One theme clearly emerges from this brief analysis. As the rationale for Government intervention in markets changes from an emphasis on

encouraging competition to predetermining at least some aspects of the outcome of the marketing process, the economic consequences for participants increasingly becomes a function of their political influence. The oft-quoted adage that politics and economics are forever bedfellows takes on renewed importance. This demands focusing our attention upon the environment within which Federal regulatory decisions are being made.

#### Current Regulatory Environment

Despite much rhetoric from the Carter administration favoring deregulation in the marketplace, with the possible exception of the airline industry there is little evidence of movement toward less governmental intervention. Actually, just the opposite appears to be more likely. Proposed trade regulations to require labels on protein supplements stating that the stuff is unnecessary, to eliminate resale margins on some products offered by funeral directors, and to mandate money-back guarantees on hearing aids, renewed interest in international commodity agreements, and blind commitment to Federal price controls on oil and gas, are random examples.

How is agricultural marketing policy being affected? Market orders are again illustrative. As we all know, these have been increasingly attacked in recent years for their anti-competitive impacts. The new solution, however, does not go at the question of competition; rather, it is to add new actors--public and consumer representatives. U.S.D.A. policy is now to add provisions for public representatives to each market order that comes up for modification. Procedures are being refined to assure that such public representatives are "bona fide" consumer representatives, however that is defined. Further, the Department is developing procedures to broaden the input from people outside the industry into the

formal hearings on market order modification. Thus, Federal regulation in these instances is expanding, rather than contracting, by putting more people into the regulatory process who reflect different ideas on what constitutes acceptable market performance.

Other changes further support this premise. The Agricultural Marketing Service, in charge of running much of the Department's market regulatory programs, has hired a public relations specialist to facilitate "public" input into the Agency's decisionmaking process. Producer-financed check-off programs for market development provide another example. U.S.D.A. is diligently at work developing uniform oversight procedures to assure that such producer-supplied funds are used in an acceptable manner. It is not yet clear what is acceptable--nutritional research and education appear likely criteria--but it is clear that the producers who foot the bill will have some company in determining how it is spent.

On the nutrition front, the school lunch program provides another illustration. The Food and Nutrition Service, which oversees that program, has promulgated a rule banning nutritionally-fortified snack foods in school lunches. In this case, the consumers (school kids) didn't exercise much influence--they seemed to like the product--but the overseers felt it was bad for the consumers' teeth. Here, the opinion of the regulator on what is acceptable was the key. The Federal Trade Commission applied roughly the same logic when proposing a ban on television advertising of sugar-coated breakfast cereals. And the Food and Drug Administration recently refused to modify ice cream standards because the Administrator was "politically convinced" that consumers would not like the taste of products which might be sold under the proposed revisions.

The list of examples can be extended ad nauseum. But the point is made. Federal regulation in agricultural markets is increasingly being based upon the rationale of creating acceptable market performance, and new actors are getting into the process who have perceptions of what is acceptable which may differ widely from what would be judged acceptable in the collective judgment of a competitive marketplace.

There are several explanations which can be put forward for this shifting orientation by Federal regulators. Some, such as structural change and the rapid pace of specialization and personal interdependency have long been recognized. However, there are a couple of factors which have received less attention--the nature of the Federal bureaucracy and what I call the "regulator mentality." Let's take a closer look.

First, to the bureaucracy. Firing hostile broadsides at the Federal bureaucracy appears to be in vogue. In this regard, perhaps I'm just in tune with the times. But, I believe that this is a major factor, abetted by an increasing amount of parochialism in Congress, influencing Federal intervention in agricultural markets.

One of my first observations when I went to Washington last year was the domination of the Office of Management and Budget over the policies of the Department of Agriculture, as well as other Federal agencies. To understand why, it is instructive to look at the evolution of OMB. Management was added to the budget office under the Nixon-Ash plan to centralize decisionmaking at the White House. OMB, armed with rules and procedures for funnelling virtually all policy decisions to the President through that agency, became the primary vehicle for implementing central control. The important point is that OMB was created to be a bureau of control, the mechanism for bringing about Nixon's "New Federalism."

Now we have a Chief Executive who espouses decentralization, who apparently has no "New Federalism" or "Great Society" or "New Frontier" or "Fair Deal" or whatever. The rhetoric is, let decisionmaking rest with the Departments and agencies, with those persons most knowledgeable in a particular area. Yet, OMB, the central control bureau, is alive and as pervasive as ever. Thus, we now have a control mechanism with no one in control. OMB has the authority to coordinate Administration policy, but little policy direction has emerged from the White House. As a result, OMB exercises its authority by subjecting each Department's policy proposals to review by just about any other agency who might be even remotely interested.

This has substantially increased the number of people which influence agricultural policy. Not that other agencies can necessarily cause outright rejection of a USDA proposal, but they often can prevent implementation without modification. One example. Agricultural price support policy, once decided largely by the USDA in conjunction with Treasury, now is routinely discussed by State, Commerce, Justice, Labor, the Domestic Council, Council of Economic Advisors, and the Council on Wage and Price Stability, coordinated of course by OMB. Another example, which hits close to home. Four outside agencies are now active partners in the determination of Federal policy toward cooperative marketing in agriculture--the Federal Trade Commission, the Department of Justice, the Council of Economic Advisors and the Council on Wage and Price Stability. None of these agencies is known for its pro-cooperative point of view.

Superimposed on this bureaucratic mosaic is the growth of a parochial Congress. While our representatives on Capitol Hill have long recognized that in the end it's the folks back home who count, I perceive a notable

decline in recent years in the numbers who maintain a national perspective. More are putting greater emphasis on the vested interests of their particular constituency. This substantially increases the number of views on what is acceptable. Because Congress is the source of the lifeblood of the bureaucracy, money, it is not surprising that the bureaucrats respond quickly to this proliferation of congressional opinion.

Next, the regulatory mind set. I detect two interesting trends here--(1) people who have sharply different perspectives and who are associated with widely varying interest groups are now in positions of power and (2) these individuals reflect the view that individual judgment is often better than the collective judgment of the marketplace.

A couple of examples from USDA. The most obvious is the appointment of Mrs. Foreman as Assistant Secretary. As a consumer advocate, she brings a substantially different point of view to the top policy level of the Department. To illustrate: prior to her appointment, she had staged a physical disruption of a USDA advisory committee meeting, protesting the insufficient "public" representation provided by one bona-fide consumer advocate on that committee. Clearly, consumer interests at the Department are now in more effective hands. Another example is the appointment of Barbara Schlei as Administrator of AMS. Her background is largely in equal employment opportunity and sex discrimination. Thus, another new perspective enters into the decisionmaking hierarchy, another set of views on what constitutes acceptable performance in agricultural markets.

These appointments of people with diverse interests correspond with a general growth in the view that the market should have a declining



role in a society of abundance. Combined, these are having the effect of reducing resistance in the Government community to more rapid substitution of the "acceptable performance" criterion for the "enhanced competition" criterion in matters of market regulation.

#### Implications For Cooperatives

How are these changes in the Federal decision-making process and in the justification or rationalization for Federal intervention in agricultural markets affecting farmer cooperatives? Clearly, people with interests in other than the agricultural community are influencing, if not outright controlling, Federal regulatory decisions which impact directly on cooperatives. Both the Justice Department and the Federal Trade Commission have viciously attacked the anti-trust immunity provided to farmers under the Capper-Volstead Act, along with Federal market orders and other Federal marketing policy. They argue that there is no evidence of a market power imbalance between farmers and others in the agricultural marketing system, and even point to the existence of a few large cooperatives such as Associated Milk Producers and Farmland Industries as evidence to the contrary. Further, they argue that, even if such an imbalance exists, it is not clear that a redress is in the public interest.

Some would dismiss these arguments, particularly as the inaccuracies contained in last year's Justice Department attack on the milk marketing system have come to light. And granted, it is hard to get too uptight when their calculations show the net annual social loss associated with monopolization by dairy cooperatives to be less than 50 cents per person. But, the critics have come back full force. Last December, President Carter chartered the National Commission for the Review of Anti-trust Laws and Procedures and charged it with making recommendations on "the desirability of retaining the various exemptions and immunities from the anti-trust laws."

The Commission reportedly has a strong interest in agriculture in general and the Capper-Volstead Act specifically. The FTC and Justice are both well represented on the Commission, along with prominent U.S. Senators and Congressmen such as Kennedy, Javits, Metzenbaum, Rodino, and Seiberling, none of whom would be members of a congressional co-op caucus, if indeed there was one.

Even within the Department of Agriculture, the critic's voice can be heard with increasing clarity. Secretary Berglund recently announced his intent to "monitor the activities of cooperatives in order to be constantly alert to any possible undue price enhancement..." With formal procedures being established to assure more than a modicum of input by consumers and other public interest groups into the Department's decision-making process, this new attention to Section 2 provisions of Capper-Volstead bears close watching. Proposed legislation to replace the largely-ineffective Agricultural Fair Practices Act would give the Secretary of Agriculture an even larger role in overseeing the operations and market behavior of those cooperatives which qualify for protection.

Furthermore, Departmental bureaucrats themselves are often notably hostile toward cooperatives. Much internal resistance to the recent USDA reorganization which folded the old Farmer Cooperative Service into a new, larger agency came from people in other parts of the merged agency who feared that they would now be viewed as proponents of cooperatives, God forbid.

Where does all of this point for today's--and tomorrow's--cooperative? Let me highlight just three points. First, I believe that the opponents of cooperative marketing in agriculture will continue their barrage on the legal foundations of farmer cooperatives until some change occurs.

I can't predict when this will happen, nor the nature of change. But, there simply are too many critics, too many people becoming increasingly entrenched in positions of influence, too many people who believe that their judgment is superior to the judgment of the marketplace, to reach any other conclusion.

Second, cooperatives and other farm organizations must work together, politically, with new vigor. Your organizations are representatives of the farming community; potentially its most important representatives in the policy process. But, I detect a trend toward less unity and greater specialization and parochialism among cooperatives and other farm organizations. This means more, rather than more unanimous, points of view on what is acceptable to farmers. Many non-farm interest groups already claim that they don't have to pay much attention to what farmers want because different farm groups express such divergent and often conflicting viewpoints that obviously, farmers themselves don't know what they want.

Third, cooperatives must prepare to take the legal initiative necessary to litigate and appeal regulatory decisions evolving out of today's legislative-regulatory environment. There can be no doubt but what there will be an increasing number of disputes between those who regulate and those who are regulated. This is a logical outcome of any process which increases the number of opinions and viewpoints held by policy makers and regulators. As farmers and other agricultural interest groups continue to lose a dominant voice in the policy and regulatory process, they will have little alternative but to turn to the courts and the legal system as a means of seeking recognition of their points of view and adjudication of their disputes with others involved in regulatory policy.

Unfortunately, I believe that we in the agricultural community are woefully ill-prepared to make this use of our legal system. Anti-trust law provides a good example. We have argued, successfully for the most part, that the Capper-Volstead Act gives the right to make monopolization and restraint of trade charges against cooperatives exclusively to the Secretary of Agriculture. As we know, in the 56 year history of that law, no Secretary of Agriculture has brought such charges. This means, in turn, that no body of case law has yet been developed and tested which serves as a boundary around the anti-trust immunity for agricultural cooperatives. But, the FTC and Justice are going to persist, and greater anti-trust action by these agencies directed toward cooperatives is sure to follow. It is going to be a lengthy, complex, and expensive legal task for cooperatives to develop that missing case law under these conditions. And it will be an even more arduous task to guide that evolving case law in a direction which does not seriously damage the cooperative marketing system.

The challenge is clear. Farmer cooperatives, which were born out of political activism in the early 1920's, must enlarge their arena of political activism and extend it to legal activism, if the voice of the farmer is going to be heard in our emerging regulatory government.